KONG WING SUM

v.

PUBLIC BANK BHD

COURT OF APPEAL, KUALA LUMPUR
NH CHAN JCA
AHMAD FAIRUZ JCA
MOKHTAR SIDIN JCA
[CIVIL APPEAL NO: A-02-696-1995]
13 DECEMBER 1999

CIVIL PROCEDURE: *Judgment in default - Setting aside - Allegation that leave not obtained to enter default judgment - Whether claim an action under a charge - Whether appellant sued as chargor - Whether judgement in default unlawful and invalid - Rules of the High Court 1980, O. 83 r. 4*

The respondent had sued the appellant and three others ('the first, second and third defendants') as guarantors of a certain loan and had obtained a judgment in default of appearance against them. On 7 August 1986, the first, second and third defendants applied to set aside the default judgment and on 23 January 1987 the High Court granted the application. Subsequently, by a summons-in-chambers application ('the SIC'), the appellant applied to set aside the default judgment. *Inter alia*, the appellant argued that the respondent had not obtained leave to enter the default judgment notwithstanding that he was a chargor, and that being so, the default judgment was unlawful and invalid. The appellant also contended that the court ought to allow the present application, as the reasons advanced in the SIC were the same as given by the first, second and third defendants in their application of 7 August 1986. The learned judge ruled that the respondent's claim was not an action under a charge, and further that the decision of 23 January 1987 was not applicable to the appellant, and in the event refused to set aside the default judgment. The appellant appealed.

Held:
Per Ahmad Fairuz JCA

[1] The finding of the learned judge is clearly consistent with the statement of claim. As the action against the appellant was not a charge action, the appellant's contention was obviously unsustainable.

[2] The summon-in-chambers filed by the first, second and third defendants to set aside the judgment in default was made by the first, second and third defendants. The affidavit in support thereof was made by the second defendant on his behalf and on behalf of the first and third defendants. That being the case, the learned judge was correct in finding that the order of 23 January 1987 could not be read as applying to or including the appellant.

[3] Since the appellant, relying on the same facts and arguments as in this case, had also filed a motion for a declaration that the order of 23 January 1987 was applicable to him, and since such motion had been dismissed on appeal to this court, the appellant is now estopped from adducing the same evidence before this court.

[Appeal dismissed.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Responden mendakwa perayu dan tiga yang lain ('defendan pertama, kedua dan ketiga') selaku penjamin kepada satu pinjaman dan telah memperoleh penghakiman ingkar kerana tiada kehadiran terhadap mereka. Pada 7 Ogos 1986, defendan pertama, kedua dan ketiga memohon untuk mengetepikan penghakiman ingkar dan pada 23 Januari 1987 Mahkamah Tinggi membenarkan permohonan. Kemudian, melalui satu permohonan saman dalam kamar ('SDK'), perayu memohon untuk mengetepikan penghakiman ingkar. Antara lain, perayu berhujah bahawa walaupun beliau seorang penggadai, responden gagal memperoleh kebenaran sebelum memasukkan penghakiman ingkar, dan ekoran itu, penghakiman ingkar tersebut adalah tidak sah. Perayu juga berkata bahawa mahkamah harus membenarkan permohonannya sekarang, oleh kerana alasan-alasan yang dikemukakan di dalam SDK adalah sama seperti yang dikemukakan oleh defendan pertama, kedua dan ketiga di dalam permohonan mereka pada 7 Ogos 1986. Yang arif hakim memutuskan bahawa tuntutan responden bukanlah tuntutan di bawah satu gadaian, dan selanjutnya bahawa perintah bertarikh 23 Januari 1987 tidak terpakai kepada perayu, dan dengan itu menolak dari mengetepikan penghakiman ingkar. Perayu telah merayu.

Diputuskan:
Oleh Ahmad Fairuz HMR

[1] Keputusan yang arif hakim adalah konsisten dengan pernyataan tuntutan. Oleh kerana tindakan terhadap perayu bukan merupakan tindakan gadaian, hujah perayu jelas tidak dapat dipertahankan.

[2] Saman dalam kamar yang difailkan oleh defendan pertama, kedua dan ketiga untuk mengetepikan penghakiman ingkar dibuat oleh defendan pertama, kedua dan ketiga. Dengan keadaan ini, hakim bijaksana adalah betul dalam rumusannya bahawa perintah bertarikh 23 Januari 1987 tidak boleh dibaca sebagai terpakai kepada ataupun merangkumi perayu.

[3] Oleh kerana perayu, dengan bergantung kepada fakta dan hujah-hujah seperti dalam kes ini, telah pun memfailkan satu usul untuk deklarasi bahawa perintah 23 Januari 1987 adalah terpakai kepadanya, dan oleh kerana usul tersebut telah ditolak oleh mahkamah ini di peringkat rayuan, maka perayu diestop dari membangkitkan keterangan yang sama di mahkamah ini sekarang.

[Rayuan ditolak.]

Case(s) referred to:

Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 ***(refd)***

For the appellant - Choy Kam Lee; M/s KL Choy & Co
For the respondent - A Sivalingam (Page Hong with him); M/s Kean Chye & Sivalingam

[Appeal from High Court, Ipoh; Civil Suit No: 1519-85]

Reported by WA Sharif

JUDGMENT

Ahmad Fairuz JCA:

The appellant had applied to set aside a judgment in default entered against him by the respondent. The application was dismissed by the Senior Assistant of the High Court Ipoh. The appellant appealed to the judge in chambers. The learned judge dismissed the appeal. The appellant then appealed to this court.

The appellant was sued as guarantor in respect of money lent by the respondent to one Kong Wing Khean trading as Far East Book Store (the first defendant). The respondent also sued Kong Wing Khean (the second defendant) and Chong Ah Thai (the third defendant) as guarantors of the loan. The appellant himself was the fourth defendant.

It was the respondent's case that the writs were served on the appellant and the other defendants on 23 September 1985. As no appearance had been entered for the appellant and the other defendants, judgment in default of appearance was entered against them on 18 October 1985. On 7 August

1986 the first, second and third defendants applied to set aside the judgment in default. Their application was granted by the High Court on 23 January 1987 (hereinafter referred to as "the decision of 23 January 1987").

On 14 July 1993 the appellant applied by way of summons-in-chambers (hereinafter referred to as "SIC") to set aside the judgment in default of 18 October 1985. In his affidavit in support of the said SIC the appellant said that the respondent had not obtained leave of the court to enter a judgment in default against him. This, the appellant contended, was necessary as the appellant was a chargor. Consequently, the judgment in default of 18 October 1985 was, according to the appellant, unlawful and invalid in law. This issue was dealt with by the learned judge thus:

> Jika diteliti kepada writ dan penyata tuntutan plaintif, adalah jelas bahawa tuntutan plaintif ke atas defendan 4 bukanlah satu tindakan di bawah gadaian. Tindakan plaintif adalah hanya untuk mendapatkan balik amaun yang terhutang. Oleh itu Aturan 83 Kaedah 4 adalah tidak terpakai di sini.

This finding of the learned judge is clearly consistent with the statement of claim. As the action against the appellant was not a charge action, the appellant's contention obviously was unsustainable.

Before this court, the appellant contended that the reasons for his SIC were the same as the reasons advanced by the first, second and third defendants in their application. As such the learned judge had to allow his application too. The learned judge, however, disagreed with the appellant's contention and decided that the decision of 23 January 1987 did not apply to and did not include the appellant as the appellant was never a party to the application of the first, second and third defendants. A scrutiny of the writ of summons against the appellant and the first, second and third defendants would show that the learned judge was right in his decision. On the writ, the defendants were cited thus:

1. Kwong Wing Khean, sole proprietor trading as Far East Book Store
2. Kong Wing Khean
3. Chong Ah Thai (f)
   all of No. 25, Jalan Selangor, Canning Gardens, Ipoh
4. Kong Wing Sum
   No. 92, Jalan Haji Eusoff
   Housing Trust, Ipoh ... Defendants

The words "all of No. 25, Jalan Selangor, Canning Gardens, Ipoh" appear after the number "3". Clearly, therefore, the address of No. 25, Jalan Selangor, Canning Gardens, Ipoh, must be that of the first, second and third defendants. It was also clear that the appellant's address was No. 92, Jalan Haji Eusoff Housing Trust, Ipoh. The SIC filed by the first, second and third defendants showed clearly that the application to set aside the judgment in default was made by the first, second and third defendants. The affidavit in support of the application was made by the second defendant on his behalf and also on behalf of the 1st and third defendants. And they contended that the writ was served on one Lee Sau Pheng who, in an affidavit affirmed on 5 August 1986, confirmed the receipt of several court documents. No mention of documents concerning the appellant was ever made in those affidavits. Based on these arguments, we agree with the learned judge when, in his grounds of judgment, he said:

> Adalah jelas dan nyata bahawa perintah bertarikh 23.1.87 adalah untuk defendan 1, 2 dan 3 sahaja iaitu pihak-pihak yang memfailkan permohonan untuk mengenepikan penyerahan writ. Untuk membaca perintah tersebut termasuk juga defendan 4 walaupun beliau bukanlah salah satu pihak di dalam permohonan tersebut adalah tidak dapat diterima dan tidak munasabah sama sekali.

In this connection, the appellant had in fact filed a notice of motion dated 28 December 1994 wherein the appellant prayed, amongst other things:

> (1) For a declaration that the Order dated 23.1.87 made by the then Mr. Justice Dato' Anuar bin Dato' Zainal Abidin, now the Chief Justice of Malaya, "that the service of the Writ of Summons on the defendants and all consequential order be and is hereby set aside" also included the 4th defendant.
>
> (2) That the 4th defendant be granted leave to file this application.
>
> (3) For leave to enter appearance in the above civil suit No. 1519-85.
>
> (4) To set aside the Writ or the service of the Writ of summons on the 4th defendant.
>
> (5) To set aside all consequential Orders obtained therefrom ...

The motion was dismissed by the High Court at Ipoh on 25 February 1995. Against that dismissal, the appellant appealed to this court. On 15 April 1996 this court dismissed with costs the appellant's appeal. What is to be noted at this juncture is the fact that the notice of motion also sought to set aside the writ or the service of the writ on the appellant and to set aside all consequential orders obtained therefrom. The affidavits used by the appellant to support his motion contained the same facts and arguments

as had been put forth in the appellant's affidavits in support of the SIC. In the circumstances, we agree with the learned respondent's counsel's contention that the appellant was estopped from adducing evidence or advancing any argument to contradict this court's decision in dismissing the appeal from the High Court's dismissal of the appellant's motion. (see *Asia Commercial Finance (M) Berhad v. Kawal Teiti Sdn. Bhd.* [1995] 3 CLJ 783; [1995] 3 AMR 2559 – Headnote – Held (1)(d)).

For the reasons stated above, we dismissed the appeal with costs and ordered that the deposit be paid to the respondent to account for taxed costs.